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[\*Mitchell v. EG&G \(Idaho\)\*](#), 87-ERA-22 (ALJ July 20, 1987)

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**U.S. DEPARTMENT OF LABOR**  
Office of Administrative Law Judges  
525 Vine Street, Suite 900  
Cincinnati, OH 45202

DATE: July 20, 1987  
CASE NO. 87-ERA-22

IN THE MATTER OF

JOSEPH S. MITCHELL,  
COMPLAINANT

v.

EG&G (IDAHO) a.k.a. EG&G SERVICES

and

TENNESSEE VALLEY AUTHORITY.  
RESPONDENTS

APPEARANCES:

BILLIE PIRNER GARDE, ESQ.,  
ROBERT GUILD, ESQ.,  
Mid-West Office  
Government Accountability Project  
FOR COMPLAINANT

E. H. RAYSON, ESQ.,  
THOMAS M. HALE, ESQ.,  
Kramer, Rayson, McVeigh, Leake & Rodgers  
FOR RESPONDENT EG&G (IDAHO) a.k.a. EG&G SERVICES

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Senior Litigation Attorney  
Office of General Counsel

Tennessee Valley Authority  
FOR RESPONDENT TENNESSEE VALLEY AUTHORITY

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BEFORE:

BERNARD J. GILDAY, JR.  
ADMINISTRATIVE LAW JUDGE

**RECOMMENDED DECISION AND ORDER**

This is a proceeding under the Energy and Reorganization Act of 1974, as amended (hereinafter referred to as the "ACT"), 42 U.S.C. § 5851, and its implementing Regulations, 29 C.F.R. Part 24.

Procedural History

Complainant, Joseph S. Mitchell, filed a complaint with the United States Department of Labor pursuant to the Employee Protection Provision of the Act and in accordance with 29 C.F.R. 24.3, on January 27, 1987. Therein he alleged that he was engaged by Respondent, EG&G (Idaho) a.k.a. EG&G Services, on February 9, 1986, to perform a complete review of the quality program of Respondent, Tennessee Valley Authority, and that he was terminated on May 30, 1986 because of his frequently expressed quality concerns and what he perceived to be the failure of Respondent, EG&G (Idaho) a.k.a. EG&G Services, to comply with Federal Regulations, specifically, 10 C.F.R. Part 50 Appendix B. He additionally represented that, until termination, he was "constantly harassed, intimidated and badgered by his management about his quality concerns." His prayer for relief includes reinstatement to Respondent, EG&G (Idaho) a.k.a. EG&G Services, at Tennessee Valley Authority in the position of responsibility he held with the weld evaluation program, back pay with interest, damages for mental suffering, attorney fees and costs.

The Area Director, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor found, on March 25, 1987, that the complaint was not filed within the thirty (30) day period established in the Act, that he was vested with no authority to waive statutory and regulatory time limitations and that no investigation of the complaint would be instituted.

Complainant, through Counsel, on March 30, 1987, requested a Formal Hearing. Notice of Hearing was issued on April 16, 1987 and, pursuant thereto, a Hearing, limited to the single issue of

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timeliness, was held on April 28, 1987 in Nashville, Tennessee at which the Parties were provided full opportunity to present testimony, to offer relevant documentary evidence and to present argument. On April 27, 1987, Respondent, Tennessee Valley Authority, filed its Motion For Judgment On The Pleadings and, at the commencement of the Formal Hearing, Respondent, EG&G (Idaho) a.k.a. EG&G Services, in writing, identically moved. Rulings thereon were reserved so as to provide Complainant's Counsel with a reasonable opportunity to respond. At the conclusion of the evidentiary Hearing, Complainant was ordered to reply to the motions of Respondents within ten (10) work days after the filing of the transcript of proceedings and Respondents were authorized to respond to Complainant's reply within ten (10) work days from the date when the same is filed (Tr 7-91-92). The transcript of proceedings was filed on May 28, 1987 and Counsel, in writing, were so advised on May 29, 1987. An Order of Enlargement issued on June 5, 1987 because of the failure of Complainant and Respondent, EG&G (Idaho) a.k.a. EG&G Services, to receive a copy of the transcript of proceedings until June 4, 1987. Complainant's opposition Brief was filed on June 22, 1987 and a Reply Brief was filed by Tennessee Valley Authority on July 6, 1987 and by EG&G(Idaho) a.k.a. EG&G Services on July 9, 1987.<sup>1</sup>

#### Complainant's Testimony

Complainant testified that for approximately six (6) years he was employed in the Nuclear Power Industry in quality control and quality assurances positions (Tr 16). His resume reflects that he holds a Degree of Associate of Applied Sciences from Phillips County Community College, Helena, Arkansas, that he is a graduate of the Nike-Hercules Electronic maintenance School, Fort Bliss, Texas and that, from 1981 through May 1986, he was employed at Nuclear Power Plants at Taft, Louisiana, Seabrook, New Hampshire, Diablo Canyon, California, Perry, Ohio, Waynesboro, Georgia and Spring City, Tennessee (CX 1). He initially noted error in the Affidavit attached to the Complaint, which he filed on January 27, 1987, and stated that he had not contacted the Tennessee Department of Labor on June 25, 1986, but did communicate with the U.S. Department of Labor on June 26, 1987 (Tr 19).

Complainant additionally testified that Qualitech Services, a job placement firm, referred him to EG&G Services and, that

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following a telephone interview with Kent Therp, Project Manager for EG&G Services, he was informed by Qualitech Services that he should report for work on February 10, 1986 at the TVA Watts Bar facility (Tr 22-25). He stated that he was assigned to a special planning team for the review of procedures for controlling the safety of welding and construction (Tr 26-27). Complainant identified a communication dated May 29, 1986 as "my reduction in work force notice" (CX 2) and he noted that on May 30, 1986 he "went for exit interviews with TVA and EG&G" which, he understood, were customarily conducted (Tr 29). He testified that he informed Rick Cutshaw of TVA's Employee

Concerns Program that "I had problems about my firing, that I felt like I was fired over quality concerns - also I voiced to him a concern about Appendix B" (Tr 31). Complainant recalled that Mr. Cutshaw stated that "it would take between 60 and 90 days before they could start an investigation because they were backlogged" (Tr 32), but, within 15 minutes thereafter, Mr. Cutshaw informed him that an investigation would begin immediately because of Complainant's Appendix B concerns (Tr 33).

Kent Therp conducted the EG&G exit interview and Complainant said that he told Mr. Therp that "I felt like I was fired over the quality concern of Appendix B" (Tr 35). It was his testimony that, approximately every two weeks, he received an update from TVA and he offered a letter under date of September 2, 1986 to him from G. G. Brantley, Site Representative, Employee Concern Program, TVA, as corroborative evidence (CX 3). A letter dated March 2, 1987 was also produced which discloses that Complainant was informed by Mr. Brantley that corrective action was taken with reference to the program procedures and that the Appendix B concern was referred to the Office of Inspector General for investigation (CX 4). Complainant additionally identified a letter dated February 27, 1987, directed to him by Norman A. Zigrossi, Inspector General, which advises that, since Complainant was a sub-contract employee, TVA could provide no appropriate remedy even if Complainant's allegations are substantiated (CX 5).

Complainant also testified that, about June 16, 1986, he conferred with Sweetwater, Tennessee Attorney Van Michael because "I felt like I needed some help on the legal aspect of it" (Tr 45). He admitted that he had no discussion with Mr. Michael about filing a complaint and he conceded that he "had an idea that I should go to the Department of Labor for help on this problem we

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had" (Tr 46). Complainant testified that on June 26, 1986 he telephoned:

1. The Washington, D.C. Wage and Hour Office of the Department of Labor, reported that he "felt like I was fired for an improper reason over quality concerns" and was told "that I had the wrong department" (Tr 48).
2. The Memphis, Tennessee Contract Compliance Office, Department of Labor and was informed "they did not handle complaints" (Tr 53).
3. The Memphis, Tennessee Wage and Hour Division of the Department of Labor and "they said they were not the ones to receive the complaint" (Tr 55).
4. The Washington, D.C. Office of Inspector General, Department of Labor and was told by a Ms. Hersey that "she would look into it" (Tr 56), but that he never again heard from her.
5. The Atlanta, Georgia Office of the Nuclear Regulatory Commission and spoke with investigator Larry Robinson about "my concerns over why I was fired and also the Appendix B problem" (Tr 59). That, at Mr. Robinson's request, he mailed "to him copies of my concerns", but that he heard nothing from Mr. Robinson (Tr 61).

Complainant then stated that, on June 27, 1986, he telephoned the U.S. Department of Labor Regional Office in Atlanta, and "voiced my concerns over my firing and over Appendix B and they said no, they were not the branch of the Labor Department that would take the complaint" (Tr 62-63). Received in evidence is a copy of a record of AT&T communications billing which reflects that on June 29, 1986 seven (7) telephone calls were made to Memphis, Tennessee, two (2) telephone calls were made to Washington, D.C. and two (2) telephone calls were made to Atlanta, Georgia, all from telephone lines listed in the name of Complainant or in the name of Complainant's step-father (CX 6 & Tr 49).

Direct examination of Complainant concluded with his testimony that through a Helena, Arkansas newspaper article, published in December, 1986, he came to file his complaint. That, prior to December, 1986, he had not been informed of his right to

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file a complaint and that he thought that TVA would investigate his concerns and "if they were found to be factual they would alleviate my problems" (Tr 63-64; 66).

On cross-examination Complainant testified that it was his understanding that his hiring and assignment was because of a contract between Wiley Labs, Huntsville, Alabama and EG&G (Idaho). He was always and only paid by Qualitech Services (Tr 68). He admitted that his employment contract was oral and provided for work as long as six months and possibly as long as a year" (Tr 69). Complainant also stated that, during April, 1986, he spoke about his Appendix B concerns with Paul O'Leary, his immediate EG&G supervisor, and with Earl Bradford, Herb Richardson, Scott McGarvey and Gary Joseph and was told "that EG&G did not have to work to Appendix B because this was going to set a new precedent and save nuclear power hundreds of millions of dollars" (Tr 71). Complainant said that while, on May 30, 1986, he did not use the word retaliation to Kent Therp, he did say "I felt, like my termination was due to quality concerns" (Tr 72). He also testified that he did nothing about filing a complaint because "I felt like my complaints were in good hands with TVA" (Tr 74-75). Complainant agreed that after May 30, 1986, he had no conversation with anyone from EG&G because "I saw no point in it" (Tr 75). He testified that he tried to speak with Attorney Michael every two weeks, that on one occasion Mr. Michael told him that "Congress was behind me 100% on Appendix B", but, when asked to file a complaint, Mr. Michael "responded by saying he did not know who to file against" (Tr 77). Complainant stated that he could not identify any person with a Wage and Hour Office with whom he spoke and that he, at no time, ever went to any Government office to confer with any person concerning his firing. (Tr 83-84).

Additional cross-examination disclosed that Complainant spoke only with EG&G employees about his quality and Appendix B concerns (Tr 85). He also testified that Mr. Cutshaw made no mention of Department of Labor procedures, that his last contact with

Attorney Michael was sometime in July, 1986 and that between July, 1986 and January, 1987 he did nothing as "I was looking for work at the time" (Tr 87).

## ISSUES

The issues presented for resolution are:

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1. Whether Respondent Tennessee Valley Authority is entitled to dismissal as a matter of law.
2. Whether the limitation period of thirty (30) days for the filing of a complaint has been equitably tolled.

## CONCLUSIONS OF LAW

### Issue I

The uncontradicted evidence establishes that, in early February, 1986, Complainant, pursuant to instructions from Qualitech, interviewed telephonically with EG&G Idaho Project Manager, Kent Therp, and, within three (3) or four (4) days thereafter, was directed by Qualitech to report for work at the TVA Watts Bar Facility (Tr 22-25). To his Counsel's question,

"I take it at some point later on you left the employment of EG&G Idaho?"

Complainant responded,

"Yes, I was terminated on May 30th." (Tr 27).

It was the unquestioned testimony of Complainant that, in a telephone conversation he had with a Washington D.C. Wage and Hour employee, he related that "I had worked at TVA Watts Bar in Tennessee for EG&G" (Tr 79). He twice acknowledged that his termination came by way of memo from Kent Therp of EG&G Idaho 28 & 72).

The evidence additionally reflects Complainant's knowledge that "Qualitech had a contract with Wiley Labs in Huntsville, Alabama and Wiley Labs had a contract with EG&G Idaho" (Tr 68). readily agreed that he understood that EG&G Idaho had a contractual relationship with the Department of Energy and that the Department of Energy had a contractual relationship with Tennessee Valley Authority (Tr 85). Complainant also admitted that he never voiced any of his Appendix B concerns to TVA employees and that his complaints were directed solely to EG&G personnel (Tr 85).

The question for resolution, in light of this evidence, whether Tennessee Valley Authority is an employer as envisioned

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by the Act and Regulations. For the following reasons, I find that it is not.

The evidence provides no hint, much less a reasonable inference, of what kind and type of relationship, if any, existed between TVA and EG&G (Idaho). There is nothing which tends to suggest that TVA subcontracted with EG&G (Idaho) for the performance of any service and I decline the invitation to speculate on how it was that EG&G (Idaho) came to evaluate the welds at the Watts Bar facility. Even without this glaring evidentiary hole, it is clear from the testimony that Complainant considered himself as an EG&G employee. That he was accorded a TVA exit interview neither detracts from the fact that Complainant worked only for EG&G (Idaho) nor strengthens any contention that TVA was also his employer. This is so because the exit interview was simply a customary and usual procedure accorded to everyone.

None of the Employee Protection Provisions of the various Acts to which 29 C.F.R. Part 24 applies provide a definition of "Employer." *See Safe Drinking Water Act*, 42 U.S.C. 300j-9; *Water Pollution Control Act*, 33 U.S.C. 1367; *Toxic Substances Control Act*, 15 U.S.C. 2622; *Solid Waste Disposal Act*, 42 U.S.C. 6971; *Clean Air Act*, 42 U.S.C. 7622; *Energy Reorganization Act*, 42 U.S.C. 5851. Neither is "Employer" defined in 29 C.F.R. Part 24. The Courts, however, have not hesitated to supply that which the Acts omit. It is generally agreed that an "Employer" is one who engages the services of another for pay. It is also the judicial consensus that the test for determining if one is an Employer and whether the relationship of Employer-Employee exists is whether or not the Employer exercises or retains the right to exercise general control as to the time, manner and method of doing the work. *Walling v. Sanders*, 136 F.2d 78 (6th Cir. 1943); *Walling v. Nashville, Chattanooga & St. Louis Railway*, 155 F.2d 1016 (6th Cir. 1946); *Fruco Construction Co. v. McClelland*, 192 F.2d 241 (8th Cir. 1951); *Eagle Star Insurance Co. Ltd. v. Deal*, 474 F.2d 1216 (8th Cir. 1973); *Hayes v. Morse*, 474 F.2d 1265 (8th Cir. 1973). Complainant has not testified, nor has he offered any evidence to prove that Respondent Tennessee Valley Authority exercised or retained the right to exercise any control over him as to the time, manner and method of performing the work to which EG&G (Idaho) assigned him. That he was compensated, neither by EG&G (Idaho) nor by Tennessee Valley Authority, but by Qualitech, is of no consequence insofar as TVA is concerned. If

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anything, this method of compensation fortifies the conclusion that TVA was not Complainant's Employer. In like manner, the fact that Complainant's work was performed at TVA's Watts Bar facility is no justification for an assertion that he was part and parcel

of the Tennessee Valley Authority's work force. Situs, standing alone or even when coupled with a customary exit interview, does not equate to employment.

It is Complainant's position that "TVA only indirectly employed Mr. Mitchell" and he staunchly opposes any "overly technical application of the term 'employee'" (CB 3). While I stand in complete agreement that there should be no "overly" technical construction of the word "employee", I conclude, nonetheless, from the evidence before me that a determination that Complainant, indirectly or otherwise, was a Tennessee Valley Authority employee grossly distorts the word's legal and common sense definition and bends it to a shape from whence there is no return.

Complainant also maintains that Tennessee Valley Authority was his employer for the reason that this Respondent is a Commission licensee (CB 4). Since there is no evidence in the record that such is the case, this contention crumbles under its own weight.

Respondent, Tennessee Valley Authority, on the other hand, aptly notes that Complainant has stated no claim for relief against it (RB-TVA 2). It points to the Complaint, the face of which shows that one of Complainant's goals is reinstatement to EG&G (Idaho) at Tennessee Valley Authority. It additionally asserts that the evidence which Complainant produced is what unequivocally demonstrates that Tennessee Valley Authority knew nothing of Complainant's safety concerns and complaints until he was terminated by EG&G (RB-TVA 3). All and singular, these are highly persuasive reasons which fortify the conclusion that Complainant, until the time of Hearing, did not consider himself a Tennessee Valley Authority employee.

The Notice of Hearing limited the issue for resolution to that of timeliness. Complainant, however, elected to roam far beyond that realm. He presented considerable testimony on the employer issue without objection from Respondents. Only when he recognized the error of his door-opening ways did he strive, unsuccessfully, to deny cross examination on the employer issue

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(Tr 68 & 69). He cannot now be heard to complain. He voluntarily amplified the range and exceeded the scope for which the Hearing was designed and is bound by the evidence which it produced. Though it was not initially an issue in this case, Complainant's procedure made it so and his evidence firmly establishes that Tennessee Valley Authority was not his employer.

## Issue 2

Both the Act (*42 U.S.C. § 5851(b)(1)*) and the Regulation C.F.R. *24.3(b)*) mandate filing of a complaint alleging discriminatory treatment for participating in protected activity within thirty (30) days after such violation. This thirty (30) day period is analogous to a statute of limitations and is not a prerequisite to an exercise of jurisdiction

by the Secretary of Labor. *City of Allentown v. Marshall, Secretary of Labor*, 657 F.2d 16 (3rd Cir. 1981). Thusly, it must be determined whether the doctrine of equitable tolling is applicable in light of the credible evidence received in this case.

Equitable tolling may be appropriate where:

1. a Defendant has actively misled Plaintiff respecting the cause of action; or
2. a Plaintiff has in some extraordinary way been prevented from asserting his rights; or
3. a Plaintiff has raised the precise statutory claim in issue but mistakenly has done so in the wrong forum, although such filing must be timely. *Id. at 20*.

The *City of Allentown, supra*, Court also pointedly observed that restrictions on equitable tolling must be scrupulously observed and noted that the tolling exception is not an open-ended invitation for Courts to disregard limitation periods simply because they may bar what may be an otherwise meritorious cause. *Id. at 20*.

Equitable tolling has not been a subject of judicial neglect. In *Wood v. Carpenter*, 101 U.S. 135 (1879), the United States Supreme Court held that stale litigation is not to be treated hospitably and in *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938), the Court stated that a statute of limitations defense is both

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substantial and meritorious. *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), which concerned tile failure to apply for crop insurance within a one (1) year statutory period, found the Court not only deciding that such failure was fatal, but adopting the conclusion reached in *Rock Island, Arkansas & Louisiana RR Co. v. United States*, 254 U.S. 141, 143 1920 that "Men must turn square corners when they deal with the Government." In *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) Justice Stevens, writing for the majority held:

"Experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law."

A claim of Government failure to advise honorably discharged, World War II veterans of eligibility for naturalization is not Government affirmative misconduct and does not trigger the doctrine of estoppel the Court ruled in *U.S. Immigration and Naturalization Service v. Hibi*, 414 U.S. 5 (1973). As long ago as *Arkansas Natural Gas Co. v. Carter*, 78 F.2d 924 (5th Cir. 1935), *cert. denied*, 296 U.S. 656, it was said that if the means of knowledge exist, if the circumstances are such as to put a man of ordinary prudence on inquiry, failure to discover one's rights is attributable to negligence or lack of due diligence.

The Secretary of Labor has also given the doctrine of equitable tolling its just due. As need be, his case by case application of the *City of Allentown* principles has resulted in decisions finding that the evidence either justifies or prohibits tolling. See *Norman v. Niagara Mohawk Power Corp.*, 85-ERA-35-36 (1985); *Egenrieder v. Metropolitan Edison Company*, 85-ERA-23 (1985); *Stokes v. Pacific Gas & Electric Co.*, 84-ERA-6 (1984); *French v. Tennessee Valley Authority*, 86-ERA-14 (1986); *Hick v. Western Concrete Structures*, 82-ERA-11 (1983).

I come now to test the credible evidence with each of the grounds for equitable tolling. For purposes of this discussion it will be assumed that Tennessee Valley Authority is an Employer subject to the Act. The questions are:

1. Was Complainant actively misled by Tennessee Valley Authority and/or by EG&G (Idaho) respecting his cause of action ?

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For the following reasons, I find that he was not. It is unquestioned that the date of the alleged violation is May 30, 1986, the day when Complainant was discharged. It is also conclusively established that Complainant had no contact with EG&G Idaho after May 30, 1986 (Tr 75). Therefore, there was no misleading of Complainant by EG&G (Idaho) respecting his cause of action. Tennessee Valley Authority, however, initiated and pursued an investigation of Complainant's Appendix B concerns and it communicated thereon with Complainant (CX 3, 4 & 5). Nonetheless, there is nothing in Complainant's testimony, nor in the letters which he received from Tennessee Valley Authority which reasonably and rationally can be construed as actively misleading him as to any of his rights. It is also uncontradicted that, as early as June 16, 1986, Complainant "had an idea that I should go to the Department of Labor for help" (Tr 46). From this statement the reasonable inference flows that he was, at least, generally aware that a remedy was available to him. Frequently in June, 1986, he conferred with Counsel of his choice about his discharge. Though he selected a lawyer unfamiliar with the applicable law, he moved timely and did not sleep on his rights. His action in seeking legal assistance operates to fortify the conclusion that nothing done by Tennessee Valley Authority tended to lull Complainant into a sense of false security or actively to mislead him. See *Miller v. International Tel. & Tel. Corp.*, 755 F.2d 20 (2nd Cir. 1985). Complainant proved that he is not an unversed, unskilled, unpolished novice. On his behalf Counsel struggled valiantly, but in vain, to demonstrate that Tennessee Valley Authority was the culprit which victimized him and, as EG&G (Idaho) duly notes, she "ingeniously" hopes to impute any and all sins of Tennessee Valley Authority to EG&G (Idaho) (RB-EG&G 10). Despite the admirable legal imagination of Complainant's Counsel, the contention that Tennessee Valley Authority led Complainant down a primrose path is a desperate grasp at a brittle straw. In like vein, there is no misleading which could be imputed to EG&G (Idaho) even if sanctions might be imposed "upon one who has not allegedly engaged in the activities which the Act was designed to discourage" (RB-EG&G 10). Thusly, there is no equitable tolling because of what Tennessee Valley Authority did or what EG&G (Idaho) did not do.

2. Was Complainant in some extraordinary way prevented from asserting his rights?

For the following reasons, I find that he was not. Again it must

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be emphasized that, after his May 30, 1986 discharge, Complainant was totally out of contact with EG&G (Idaho) (Tr 75). Thusly, it cannot be said that EG&G (Idaho) in some extraordinary way prevented him from asserting his rights after that date. Moreover, there is no evidence that, at any time, or in any way prior to May 30, 1986, EG&G (Idaho) did, or failed to do, anything which could be considered as an extraordinary act which prevented Complainant from asserting his rights. By the same token, much of what has heretofore been said concerning me post May 30, 1986 action of Tennessee Valley Authority applies with equal force to this equitable tolling ground. At this point, however, it is prudent to consider the full meaning of the adjective extraordinary. An act or event is said to be extraordinary when it is exceptional to a very marked degree, when it is remarkable, or when it is uncommon and most noticeable. *Webster's Ninth New Collegiate Dictionary*. A test of this definition to the writings and sayings of Tennessee Valley Authority demonstrates that, not only was the extraordinary tier never approached, but that nothing was done or said which prevented Complainant from asserting his rights. The letter of September 2, 1986 merely advises that Complainant's concerns had been assigned for investigation (CX 3). The March 2, 1987 letter simply reports that corrective action was taken on Complainant's Appendix B concerns and that a status report was requested from the Inspector General on Complainant's discharge complain (CX 4). The communication, under date of February 27, 1987, to Complainant from the Inspector General advises that, even if Complainant's allegations were substantiated, no adequate remedy could be provided by the Tennessee Valley Authority (CX 5). Cautious review of the Hearing Transcript discloses nothing which could be considered as dissuading Complainant from asserting any right, or causing him to conclude that he need have no fear that his rights were preserved and protected. Thusly, there is no equitable tolling because of what Tennessee Valley Authority did or because of what EG&G (Idaho) did or did not do.

3. Did Complainant, mistakenly, but timely, raise the precise statutory claim in issue in the wrong forum?

For the following reasons, I find that he did not. At the outset it must not be overlooked that 29 C.F.R. 24.3(c) provides:

No particular form of complaint is required, except that a *complaint must be in writing* and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violation. (Emphasis Added).

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Nor may it be ignored that Forum has been judicially defined as a place of jurisdiction, a place of litigation and a place where a remedy is pursued. *Vose v. Philbrook*, 28 Fed. Cas. 1293, 3 Story 335; *Rubin v. Gallagher*, 292 N.W. 584. In cases of this character, the proper, Congressionally identified Forum is the Secretary of Labor. 42 U.S.C. 5851(1). Administrative relief for alleged wrongful discharge from employment is reserved to the Secretary and he alone can provide a remedy, though his decisions are judicially reviewable.

The phrase "raise the precise statutory claim" must also be addressed. While exhaustive research fails to reveal any case which construes this language, reason and common sense dictate that there is not an iota of difference between raising the precise statutory claim and filing a complaint. If there is a difference, it is without distinction. Thusly, where it is mandated that a complaint be in writing, it logically follows that a precise statutory claim is also properly and lawfully raised when, and only when, it is in writing.

All four (4) telephone contacts Complainant had with the U.S. Department of Labor on June 26, 1986 were with the right and not with the wrong forum. While, on each occasion, he may have orally raised the precise statutory claim, he fails to invoke the equitable tolling rule because he was in the forum where he should have been and his presentation was not in writing. Since he was not in the wrong forum, the equitable tolling principle is simply inapplicable. Complainant, nonetheless, takes comfort in both *Hick v. Western Concrete Structures, Inc.*, 82-ERA-11, (Recommended Decision and Order, 1983), and in *Rose v. Secretary of Labor*, 800 F.2d 563 (6th Cir. 1986) (CB 9 & 11). In *Hick* the Administrative Law Judge, without any supporting authority, fashioned a constructive filing category for the equitable tolling doctrine. He concluded that, where a Complainant visits a Wage and Hour Office within the thirty (30) day filing period and is erroneously informed "that they could not do anything for him", the "complaint should be deemed to have been constructively filed on the occasion of his first visit to the Wage and Hour Division" *Id. at 2*. Thorough research, however, conclusively establishes that the constructive filing finding of *Hicks* is ill-conceived and is fraught with error. In every instance where

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the Courts have come to consider either or both the sufficiency of what was filed or with whom a filing was made, a *writing* was involved. There is sparse mention of constructive filing and nothing which approves, condones or tolerates an oral constructive filing. In *People v. Spencer*, 193 Cal. App. 2nd 13, 13 Cal. Rptr, 881-883 (1961), the Court stated that 'the filing of a document with a person who is the only one available to receive it, though he is not the designated person to receive it, is a constructive filing.' In forceful terms, the panel in *Smith v. United States*, 425 F.2d 173 (9th Cir. 1970), held that an oral notice of appeal is not the filing of an appeal and to hold otherwise would open a "Pandora's Box." *See also United States v. Hove*, 548 F.2d 1271 (6th Cir. 1977); *United States v. Isabella*, 251 F.2d 223 (2nd Cir. 1958); *People v. Slobodion*, 30 Cal. 2d 362, 181

P.2d 868 (1947); *Fallen v. United States*, 378 U.S. 139 (1964); *Causey v. Civiletti*, 621 F.2d 691 (5th Cir. 1980); *United States v. Ward*, 696 F.2d 1315 (11th Cir.) *cert. denied* 461 U.S. 934 (1983). That all of the authorities located and cited are criminal cases is not surprising. The oral constructive filing prohibition is so basic and firmly implanted that challenges are not raised in civil or administrative proceedings. I, therefore, reject *Hick* as being fatally flawed and decline to follow its holding.

Complainant's reliance upon *Rose* is misplaced. The case is not on point and is readily distinguished from the instant action. In *Rose* the Area Administrator ignored his regulatory responsibility in that he did not, in writing, inform the Complainant of the five (5) day period within which to request a Formal Hearing. The Court concluded that the Secretary's failure to follow his own regulations was his undoing and that Complainant could not be deprived of his right of decision review when the Area Administrator was the guilty party. In this case, however, there is no duty assigned by law to anyone to provide information concerning the thirty (30) days time frame for filing a complaint. While it is unfortunate and regrettable that Complainant may have been misinformed, he has provided nothing, legal in nature, which suggests that he should have been, by someone, informed accurately of his rights. His estoppel argument (CB 12) must be cast aside in light of *Hibi, supra*.

The evidence does establish that, on two (2) occasions, Complainant did place himself in the wrong forum. At the May 30, 1986 TVA exit interview Complainant orally expressed his "problems about my firing" (Tr 31). While timeliness and wrong

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forum are established, his failure to set forth these problems in writing prevents invocation of the tolling doctrine. On June 26, 1986, he telephonically conferred with Nuclear Regulatory Commission Investigator Larry Robinson. In this wrong forum it is more probable than not that Complainant orally raised the precise statutory claim. It is also uncontradicted that he complied with instructions and mailed to Inspector Robinson "copies of my concerns" (Tr 61). The evidence, however, fails to establish when this mailing was accomplished. To trigger an application of the equitable tolling doctrine, it is essential to show that the filing was timely made. Here, there is no such showing. The alleged violation occurred on May 29, 1986 with the notice of termination of Complainant's employment. *Chardon v. Fernandez*, 454 U.S. 6 (1981); *Delaware State College v. Ricks*, 449 U.S. 250 (1980). The thirty (30) days filing period, therefore, expired on June 29, 1986. In the absence of credible proof, it cannot be assumed that the writings were mailed to Inspector Robinson within the thirty (30) day period. Time, thusly, cannot be tolled when such a significant evidentiary hole exists.

The paramount theme of *City of Allentown, supra*, is that a jealous guarding of the principles of equitable tolling is critical to even-handed justice. The Complaint in this case was filed 213 days after the expiration of the thirty (30) days filing period established by Congress. This fact strips all credence from the "diligent efforts" which

Complainant is said to have exhibited (CB 13). Exposure to liability for approximately seven (7) months without any persuasive demonstration of one or more of the requisites of tolling shocks the conscience of any reasonable person. Construing the Motion For Judgment On The Pleadings, filed by each Respondent, as a Motion To Dismiss, I find that both the law and fundamental fairness dictate that both Motions be granted.

RECOMMENDED ORDER

For the reasons herein set forth, it is recommended that the Complaint, filed on January 27, 1987 by Joseph S. Mitchell, be *DISMISSED* as untimely.

BERNARD J. GILDAY, JR.      ADMINISTRATIVE LAW JUDGE

**[ENDNOTES]**

<sup>1</sup> The following abbreviations are used: Tr = Transcript of Proceedings; CX = Complainant's Exhibit; CB = Complainant's Brief; RB-EEG = Respondent's Brief, EG&G (Idaho); RB-TVA = Respondent's Brief, Tennessee Valley Authority.